Supreme Court, U.S.
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No. 01 531

IN THE

Supreme Court of the United States

FARM & GROVE REALTY COMPANY,

Petitioner

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY,
and KEVIN JUDD,

Respondents.

On Petition for Writ of Certiorari
to the Fifth District Court of Appeals
for the State of Florida

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED

(1) Whether "viable usefulness and economic value" of land affected by ordinances that allegedly violate the landowner's rights of Equal Protection is a valid basis for dismissing the landowner's equal protection claims.

(2) Whether Petitioner Farm & Grove Realty's as-applied and facial Equal Protection claims were subject to a failure-to-state-a-claim dismissalbased on a finding that "real doubt is cast upon whether Plaintiff's asserted Claim is ripe for determination as a result of any dispositive action by [Brevard County]," despite allegations and evidence that Respondent Brevard County, the relevant governmental authority, has made a final decision adverse to the claimant's property rights and that the governmental authority's action was arbitrary, capricious, and a thinly disguised method to create an unfair, illegal, and confiscatory tax or condition upon Petitioner's property which results in a permanent inordinate burden thereon.

(3) Whether Respondent Brevard County's new ordinances and other actions deny Equal Protection -- both facially and as applied -- in requiring Petitioner Farm & Grove Realty and other lone property owners, desiring to obtain a building permit for the property, to construct a costly road to the property that would greatly and directly benefit adjoining property owners, while the ordinances also abolish the only effective means of cost-sharing or equitable contribution for the cost of the road among all property owners directly benefitting from the construction of the road.

(4) Whether Florida's post-deprivation remedy of a state lawsuit for a taking by inverse condemnation is inadequate because Petitioner Farm & Grove Realty's state claim for inverse condemnation cannot be brought against Respondents The Nature Conservancy and Kevin Judd, private entities acting in the role of state actor.

(5) Whether Florida's inverse condemnation remedy is inadequate because Petitioner Farm & Grove Realty's state claim for inverse condemnation cannot be tried before a jury.

(6) Whether Florida's inverse condemnation remedy is inadequate in forcing mitigation sales, somewhat analogous to Transferable Development Rights (TDRs), of Petitioner Farm & Grove Realty's land in a mitigation market created and controlled by Respondents because such mitigation sales constitute less than just compensation and cannot be the basis for a tract of land's economic value when that land's open-market economic value has been eliminated by regulatory and other actions of those same Respondents.

(7) Whether the Florida court of last resort decided Petitioner's conspiracy claims under 42 U.S.C. S 1983 in a way that conflicts with decisions of this Court.

CORPORATE DISCLOSURE STATEMENT

Farm & Grove Realty Company has no parent corporation, and no publicly held company owns more than 10% of Farm & Grove Realty Company's stock.

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OPINIONS BELOW

The opinions of the Fifth District Court of Appeals of Florida and the Eighteenth Judicial Circuit Court of Florida are unreported but are included in the Appendix to this Petition at AI-3, AI-5, AI-7, AI-9, and AI-10. (Volumes of Appendix are cited as AI and AII, followed by the page number where the cited material begins.) The Fifth DCA decision is published in a table without reported opinion at 785 So. 2d 498 (Fla. App. 2001).

JURISDICTIONAL STATEMENT

The order sought to be reviewed was entered on April 17, 2001. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1257(A).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

U.S. Const. amend. V (Full text at AI-13.)
U.S. Const. amend. XIV (Full text at AI-13.)
Brevard County Ordinance 80-50 (Full text at AI-14).
Brevard County Ordinance 91-08 (Full text at AI-18).
Brevard County Ordinance 91-12 (Full text at AI-25).
Brevard County Ordinance 93-27 (Full text at AI-50).

STATEMENT OF THE CASE

On March 20, 1996, Petitioner Farm & Grove (F&G), filed an action against Respondent Brevard County for declaratory and other relief regarding the alleged regulatory taking of a single parcel of F&G's property, known as Tract 184, in Cape Kennedy Estates, through the inequitable application of road regulations (The Road Suit), trial court Case No: 96-4509-CA. The Road Suit included the following counts: I. Declaratory Relief; II. Fifth/Fourteenth Amendment Takings Claim; III. Fifth/Fourteenth Amendment Due Process Claim; IV. Fifth/Fourteenth Amendment Violation by Arbitrary and Capricious Conduct; V. Fifth/ Fourteenth Amendment Violation of Equal Protection Rights; VI. 42 U.S.C. 1981 et seq. for Denial of Civil Rights; and VII. Violation of Florida Constitution, Article 1, Sections 2, 9, and 10. The County filed a Motion to Dismiss, and on July 16, 1996, the trial court granted that Motion as to all counts but Count I.

On September 4, 1996, F&G filed a separate Complaint against Brevard County, The Nature Conservancy (TNC), as

acquisition agent for and co-conspirator with the County, and Kevin Judd (Judd), as acquisition agent for and co-conspirator with TNC and the County, and individually (trial court Case No: 96-14296-CA, the Takings Suit.). This Complaint originally included the following counts: I. Inverse Condemnation/ Constitutional Taking; II. 42 U.S.C. § 1983 for unconstitutional taking and conspiracy; and III. Illegal Monopoly and Restraint of Trade.[1] First and Second Amended Complaints added a Count for Civil Conspiracy.

All Defendants moved for summary judgment. On April 29, 1999, the trial court entered an order granting in part and denying in part the motions for summary judgment. The summary judgment was granted as to Counts II and III for 1983 claims and for conspiracy, which were the only counts in which TNC and Judd were named as Defendants. The summary judgment was denied as to Count I for inverse condemnation, for which the County was the only Defendant. The order granting summary judgment was appealed to the 5th DCA in District Court Number 99-2355 because the order disposed of TNC and Judd as parties in the case.

In the meantime, at the request of the County, the Road Suit and the Takings Suit had been consolidated on March 5, 1999. The case went to trial on the remaining count in the Road Suit, which was Count I for declaratory relief, and the remaining count in the Takings Suit, which was for inverse condemnation. The only Defendant at the time of trial was the County.

The trial in this matter was a bench trial, and was decided solely on the issue of whether or not a taking had occurred. On February 7, 2000, the trial court entered its final judgment in this case ruling in favor of the County. On February 28, 2000, F&G timely filed a Notice of Appeal to the 5th DCA in District Court Number 00-649. The 5th DCA consolidated the two appeals, and on April 17, 2001, affirmed all issues on appeal per curiam without an opinion. Because all issues were affirmed per curiam on appeal without an opinion, F&G could not petition to the Florida Supreme Court for certiorari review, and the 5th DCA's per curiam affirmance (P.C.A.) of the trial court was a final

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[1]This Count was dismissed on a motion to dismiss that is not the subject of this Petition.

judgment in a state court of last resort.

Regarding questions presented 1 through 3, Petitioner's claim for violation of its Equal Protection rights, this claim was first brought in the trial court in Count V of Petitioner's Complaint in the Road Suit (Case No. 96-4509-CA), which Complaint is in the Appendix of this Petition at AI-60. The trial court dismissed all but one count of this Complaint, including Petitioner's Equal Protection Count in an Order in the Appendix at AI-3. The dismissal of Petitioner's Equal Protection Count was appealed by Petitioner to the 5th DCA in District Court case number 00-649. The portion of Petitioner's appellate briefs preserving the Equal Protection claim for this Court's review on Petition for Writ of Certiorari are in the Appendix to this Petition at AII-59. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in the Appendix at AI-9.

As to question presented 4 regarding whether Florida's post-deprivation remedy of a state lawsuit for inverse condemnation is inadequate because a landowner cannot sue a private entity state actor for a taking, this issue goes to whether or not Petitioner's Fifth Amendment taking claim against all Respondents was ripe. Petitioner's Fifth Amendment taking claim against all Respondents was presented as Count II of the Second Amended Complaint in the takings case (Case No. 96-14296-CA), which is in the Appendix at AII-2. The issue of the ripeness of Petitioner's Fifth Amendment takings claims was raised by all Respondents in their Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII52-54. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II) on April 29, 1999, which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. The Petitioner appealed the trial court's grant of summary judgment to the 5th DCA in Case No. 99-2355, and the issue of the inadequacy of the state remedy because Petitioner could not sue Respondents TNC and Judd was raised in Petitioner's Initial Brief and Reply Brief in that appeal. The relevant portions of the

Initial Brief are quoted in the Appendix at AII-54. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in its entirety in the Appendix at AI-9.

As to question presented number 5, regarding whether Florida's post-deprivation remedy of a state lawsuit for inverse condemnation is inadequate because a landowner in not entitled to a jury trial on the issue of whether a taking occurred, this issue goes to whether or not Petitioner's Fifth Amendment taking claim against all Respondents was ripe. Petitioner's Fifth Amendment taking claim against all Respondents was presented as Count II of the Second Amended Complaint in the takings case (Case No. 96-14296-CA), which is set out in the Appendix at AII-2. The issue of the ripeness of Petitioner's Fifth Amendment takings claims was raised by all Respondents in their Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII-52-54. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II), which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. Additionally, the Petitioner filed a Memorandum of Plaintiff as to Issues to be Resolved at Rehearing citing to City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999), which held that plaintiffs in takings cases are entitled to a jury trial. (AI-74.) This shows that the issue of a jury trial was addressed in the Motion for Rehearing. Moreover, the Petitioner's Memorandum opposing Respondents' Motions for Summary Judgment includes argument regarding a jury trial for Plaintiff's federal claims, citing Del Monte Dunes. (AII-19.) Additionally, the trial of the inverse condemnation claim in this case, which is the state's only post-deprivation remedy, was a bench trial, not a jury trial. The Petitioner appealed the trial court's grant of summary judgment to the Florida Fifth District Court of Appeal in Case No. 99-2355, and the issue of the inadequacy of the state remedy because Petitioner was not entitled to a jury trial in state court was raised in Petitioner's Initial Brief and Reply Brief in that appeal. (AII-54.) The 5th

DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001. (AI-9.)

As to question presented number 6, regarding whether Florida's post-deprivation remedy of a state lawsuit for inverse condemnation is inadequate because a landowner is required to participate in a mitigation market as the remedy, this issue goes to whether or not Petitioner's Fifth Amendment taking claim against all Respondents was ripe. Petitioner's Fifth Amendment taking claim against all Respondents was presented as Count II of the Second Amended Complaint in the takings case (Case No. 96-14296-CA), which is set out in the Appendix at AII-2. The issue of the ripeness of Petitioner's Fifth Amendment takings claims was raised by all Respondents in their Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII-52-54. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II), which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. Additionally, the issue of the mitigation market being inadequate is raised in the Second Amended Complaint in the takings suit at Paragraphs 9 and 12. The issue of the adequacy of the mitigation market was also raised in Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment, the relevant portions of which are quoted in the Appendix at AII-20. The issue of the adequacy of the mitigation market was also raised by the trial court in the final judgment on the inverse condemnation claim, which order is set out in the Appendix at AI-10. This ruling was appealed by Petitioner to the 5th DCA, and the adequacy of the mitigation market was raised in Petitioner's Initial Briefs, the relevant portions of which are quoted in the Appendix at AII-54 and AII-59. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in the Appendix at AI-9.

As to question presented number 7, which addresses the sufficiency of Petitioner's claim for Section 1983 conspiracy by all Respondents, the Section 1983 conspiracy claim was raised in the

Second Amended Complaint to the trial court. The sufficiency of Petitioner's 1983 conspiracy claim was raised in the trial court by the Petitioner in Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment, which is included in the Appendix at AII-20. The trial court entered an order granting the Respondents' Motions for Summary Judgment as to the federal takings claim (Count II), which is set out in the Appendix at AI-5. The Petitioner filed a Motion for Rehearing on the trial court's order granting summary judgment, which Motion for Rehearing was denied. The Motion for Rehearing is set out in the Appendix at AI-72, and the Order denying rehearing is set out in the Appendix at AI-7. These rulings were appealed by Petitioner to the 5th DCA in Case No. 99-2355, and the sufficiency of the 1983 conspiracy claim was raised in Petitioner's Initial Brief, the relevant portions of which are quoted in the Appendix at AII-54. The 5th DCA issued its P.C.A. of the trial court's dismissal on April 17, 2001, set out in the Appendix at AI-9.

Statement of the Facts

In 1968 Atlantic Ridge Corporation subdivided a 12,500 acre ranch into 6,700 1.5 and 2 acre lots, spread out over 25 square miles in southern Brevard County, Florida. (R. 2797, 2779.) The subdivision, known as Cape Kennedy Estates (CKE), complied with all ordinances of Respondent Brevard County applicable at that time and the lots were registered for sale pursuant to the Florida Land Sales Act, Chapter 498 Fla. Stat., and the federal Interstate Land Sales Act. (R. 1356-57.) By early 1972, Atlantic Ridge had sold all 6,700 lots on an installment basis, but took back approximately 1,350 lots because of cancellation of installment sales. (R 2797). In 1981 Petitioner Farm & Grove Realty Company (F&G), acquired the 1,350 CKE lots from Atlantic Ridge, including Tract 184. (R. 1356, 2784-85.) Because these lots were available as sales that had been canceled by separate individual buyers, the lots were randomly scattered non-contiguously over the 25 square mile subdivision. (R. 2784.) Before F&G's purchase of the CKE Lots, F&G's licensed real estate broker/attorney examined each lot and determined each lot to be legally, ethically, and economically saleable and suitable as a homesite without undue regulation or burden by applicable federal, state, and county laws and

regulations. (R. 1356.) As the result of this determination, F&G's substantial investment in the property began in July, 1981, with a professionally created sales promotion of the CKE Lots. (R. 2784.) The sales program was successful, and F&G became the most active seller of lots in the CKE area. (R. 1357, 2784.) By October, 1994, (the time at which the actions complained of herein accrued) F&G had recorded in the public records of Brevard County over 600 lot sales totaling more than $7,600,000 in revenue. (R. 2784.)

At the time F&G purchased the lots from Atlantic Ridge, the County did not have any ordinance that required the building of roads in order to obtain a building permit. Rather, the County ordinance required that a property for which an owner sought a building permit was required to abut a dedicated road easement. Brevard County 80-50. All of the CKE Lots qualified. There was no requirement that the abutting road actually be built, and there were certainly no standards for how the roads were to be constructed. 80-50. Then, in 1991, the County adopted its first ordinance requiring that a road actually be built before a building permit would be issued. (Brevard County Ordinances; Exhibits to County's Requests for Admissions.) Simultaneously, the County enacted an ordinance that provided for a capital funding mechanism; i.e., a special tax district called a Municipal Service Benefit Unit (MSBU) to be set up to assist property owners in meeting the County's new road restrictions. MSBUs provided that the County issue bonds and build a road if the property owners on the road agreed to the building of the road. Once agreement was reached, the County built the road, and the cost was prorated by special improvement assessments spread over ten years, which were made on each landowner on the street to pay for the cost of the road. Thus, even under the County's new, more restrictive, road requirements in 1991, F&G's lots continued to sell because they still had some of their economic value as homesites. (Brevard County Ordinances) On October 18, 1994 the County removed the availability of the MSBU to the Cape Kennedy Estates area, including Tract 184, where no prior construction had occurred. (R. 1360.; Exhibit E to Complaint; AI-60.) Since 1991, when the County first required a road to be built before a building permit would be issued, this pro-rata mechanism for funding road construction had provided

the only economically feasible method for constructing the access required for owners of CKE lots to obtain building permits. (R. 2426-2428, 2418-2424.) Brevard County's land appraisers acknowledged in their respective appraisals that the MSBU was no longer available and that this unavailability destroyed the feasibility of the development of all of F&G's remaining lots. (R. 2426-2428.) Despite requests by F&G to bring the unpaved road ordinance into line with other infrastructure provisions affecting roads, water, and sewer extensions. The County refused to to enact any cost-sharing provision for the unpaved road Ordinance. (R. 1360 & Exhibit G to Complaint.) With no chance for reimbursement, the ordinance put 100% of the cost of the road -- a road that benefitted every property abutting the road -- on the applicant who then found the cost of building the road exceeded the finished value of the applicant's lot. (R. 4208.) This economic penalty effectively stopped sales of CKE lots, including Tract 184. (R. 2795, 2778.)

Meanwhile, in the early 1990's, the United States Fish & Wildlife Service (USF&W) gave notice to Brevard County that the County could be considered responsible for any unpermitted violations of the Act occurring within its boundaries that might endanger the threatened Scrub Jay or its habitat. (R. 1357, 2775, 2785, 2792; Peffer Depo. at 8.) In response, Respondent Brevard County created the "Scrub Jay Committee" to work with County staff and other scientists to examine the various options the County might have under the Endangered Species Act. (Barr Depo at 9; Peffer Depo at 8.) Respondent The Nature Conservancy (TNC) worked with the County's staff and the Scrub Jay Committee in creating this Mitigation Plan. (Barr Depo. at 36; Robinson Depo. at 22; Pescatello Depo. at 12.) Starting in December of 1992 until on or about July 26, 1995, the County-Wide Mitigation Plan was formalized as the Scrub Jay Conservation and Development Plan, "SCDP", (the Scrub Jay Plan). (R. 1388; Robinson Depo. at 10.) The SCDP scientifically designated critical "Core" areas where scrub jays nested. (Barr Depo. at 21,22.) 242 of F&G's lots (The Core Lots) are located within Core areas and are some of the subject properties of the claims in this case. (R. 1358.)

The SCDP expressly recognized that landowners in the Core areas, such as F&G, would not be allowed to apply for

variances, appeals, exceptions or other administrative remedy or relief from this designation. However, after the County's attorney warned the County Commission that they would have to pay fair market value for all of the property in the core areas, Brevard County rejected formal adoption of the Scrub Jay Plan. (Peffer Depo. at 17-19; Robinson Depo. at 13.) Instead, the County Commission directed the County's officials to implement the provisions of the Scrub Jay Plan by acquiring Core areas. (R. 1361; Robinson Depo. at 14; Peffer Depo. at 17-1.) However, the County's de facto adoption of the Scrub Jay Plan eliminated fair market value principles required by a government taking of property, and the County instructed its employees, as a policy set by the County Commission, to acquire the lands not only at less than fair market value but at the lowest possible cost. (Peffer Depo at 36.) The County employees were instructed to use various tactics to reduce the acquisition price of Core area land, including imposing regulatory measures to reach its goal. (Brevard County Memo, April 10, 1977; R. 2358.) The County invited proposals from various entities to become the County's acquisition agent to administer this program. (R. 1362.) In response to this request, TNC submitted its proposal, which extolled its expertise in purchasing lands at prices significantly below fair market value appraisals. (Exhibit I to Complaint) The motto and goal of TNC was "40¢ on the dollar" (R. 1367, 4204; Nations Depo. at 61-63.) The acquisition practices of the County were "to be meaner than a junk yard dog." (R. 2392.) In its application, TNC boasted of a previous land acquisition scheme where it purchased property in northern Brevard County known as the Enchanted Forest, which TNC then sold to the County. (Exhibit I to Complaint, R-2) TNC's application states that TNC refused to negotiate with the owner of the property, knowing that the property owner was in financial dire straits and waiting until the mortgagee foreclosed on the property, making a private arrangement with the mortgagee prior to the foreclosure sale and purchasing the property for $100 over the loan balance. (Exhibit I to Complain; Burns Depo. at 28 & 29.) TNC extolled its expertise in appraisal methods and in working with and training County personnel to conduct boundary mapping, surveys, environmental audits and appraisals. (Exhibit I to Complaint, Page 5, R-2.)

On Pearl Harbor Day, December 7, 1993, Brevard County approved TNC's application and hired TNC as an independent contractor for the job of acquiring property for the County at below fair market value (Employment Contract). (Exhibit K to Complaint.) TNC then hired Respondent Kevin Judd (Judd) that same month as its employee to work with the County in the performance of the Employment Contract. (Judd Depo. at 18.) The County and TNC, specifically trained Judd to follow methods to obtain property at less than fair market value. (Judd Depo. at 31 & 32.) Judd, on behalf of TNC and the County, implemented the plan of TNC and the County to obtain the land at below fair market value. (Wetlands Survey; Judd Depo.; Boundary Survey; R. 2437-39, 2448.) Judd's course of conduct was heartily endorsed and promoted by TNC and the County, and, in fact, was a central theme of reports of below market acquisitions contained in the quarterly self-evaluations submitted by TNC to the County and endorsed by Dr. Duane DeFreese, the County employee charged with coordinating the County's efforts with TNC. (R. 1364; Exhibits L-1 through L-7 to the Complaint; R. 2392.)

Judd's practice was to disregard the fair market value stated in appraisals; and, instead, to use the price of the lowest priced property used as a comparable property in the appraisals. (Judd Depo. at Page 31.) Judd also sent letters to landowners warning of "limited funds" and stating that it was a "one time only offer." (R. 2430.) In dealing with owners of larger parcels, Judd and TNC devised a method to exert last minute pressure by setting out a price high enough to be agreeable to the owner. (R. 2398 - 2402.) In one instance they even executed a written Letter of Intent. (R. 2398 - 2401.) Then, when plans and commitments had been made by the owner, the offer was reduced by 50%, (R. 2398-2401.), or even 60% (R. 1367), in spite of Judd and TNC's admitted duty to deal in good faith. (Nations Depo.) In another instance, the Appellees refused to pay for land that had been included in the contract because of an alleged title defect; however, even when the title defect was cleared, Appellees still failed to pay for the land included in the contract. (R. 2402.) The Respondents also used appraisals based on non-arms-length mitigation sales as comparable sales, and not based on the market's traditional per-lot method of valuation -- all in violation

of applicable standards. (Appraisal, Exhibit M to Complaint, Monograph, Exhibit H to Complaint; R. 2797, 2404; Appraisal, Exhibit M to Complaint.) Respondents also reduced the valuation of each lot 8-20% by subtracting the unused road easements, which was particularly inappropriate because Respondents knew that roads would not be built in a conservation area; thus the road easements would never be used and could not reduce the value of the property. (Judd Depo. at 67.; R. 4204.) Respondents also offered about one-tenth of their upland price for lots deemed to be "wetlands" in contravention of state law. (Judd Depo, Page 66; R. 2448, 1366.) F&G, struggling to survive and so that it could have some hope of selling these few lots, commenced building a small and finite number of unpaved roads without hope of cost-sharing from landowners who benefit from the new road abutting their properties. The County then imposed improper engineering and construction requirements to add time and cost to building the roads and to destroy the attractiveness of the lots. (R. 4207.) However, the unpaved road ordinance also restricted unpaved roads to no more than 1,320 feet from the nearest paved road. (Exhibit F to Complaint.) As all of the CKE lots in one of the core areas, the Valkaria Core, are substantially more than 1320 feet from the nearest paved road, this removed all of the Valkaria "Core" from its use. (R. 2778, 2795.)

Access to lots in sections 19, 20, 29, and 30 historically had been effected through a series of farm roads and canal maintenance roads. The County systematically closed or blocked these roads. Additionally, the County's application to the CARL program and TNC's application to the County spoke of controlled burns in the Core area. (Application Letter, Exhibit I to Complaint, R-2.) Also, the regulations for these controlled burns stated that they were allowed to be conducted right up to the edge of the property line with no setback requirement; thus, creating a higher risk of the spread of fire to neighboring lots. (Erik Tietig Affidavit; Exhibit to Plaintiff's Response to Motion for Summary Judgement.) With the recent history of homes in Florida burned by out-of-control forest fires, safety and habitability for humans was destroyed. (R. 2793.) Additionally, the County claimed the scrub jays were in danger from the Cooper's Hawk, which lived in tall trees (R. 4204); therefore, the

County logged all of its acquired Core area lands, removing the beautiful large oak and pine growth and turning the area into clear-cut desolation. (Exhibit I to Complaint, R-2.) This clear-cutting exacerbated the aversion of people to the Core areas for human habitation and destroyed purchase desirability. (R. 2776, 2793, 4204.) Throughout the time that Respondents were taking all of these actions, they released and encouraged more than 700 articles in one newspaper alone as well as other media stories, leaving no doubt that human use of these areas was incompatible with the Core nesting areas. (R. 2392, 2776, 2785, 2792-93.) The combination of physical barriers, improper appraisals, improper wetlands determination, improper area computation from the survey, destruction of access, clear-cutting of habitat, life-threatening and property-threatening burning practices, denial of road building laws and destruction of the private market resulted in the taking of 242 Core lots from F&G, the loss of F&G's ability to sell its remaining lots, and the destruction of F&G's business. (R. 2775, 2778, 2780, 2792-98.)

ARGUMENT

I. "VIABLE USEFULNESS AND ECONOMIC VALUE" DO NOT PRECLUDE EQUAL PROTECTION CLAIMS.

The 5th DCA's P.C.A. of the dismissal of Petitioner Farm & Grove Realty, Inc.'s, (F&G) Equal Protection claims, apparently on the ground that the property had "viable economic use and value," was a state court of last resort deciding an important federal question in a way that conflicts with the decisions of this Court and a United States court of appeals.[2] Whether the subject property retained some use and value is immaterial under Equal Protection analysis because, *inter alia*, "the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. . . . An

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[2] Although the grounds for the trial court's dismissal of F&G's Equal Protection claim were that the property had "viable economic use and value" and that "real doubt is cast upon whether Plaintiff's asserted Claim is 'ripe,'" it is appropriate to treat them as alternative bases of decision. See MacDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340, 346 (1986) (stating that when a lower court does not rest its holding on only one of its two stated reasons, it is appropriate to treat the reasons as alternative bases of decision).

equal protection claim revolves around whether similarly situated persons are treated differently." The Reserve, Ltd., v. Town of Longboat Key, 17 F.3d 1374, 1381 (11th Cir. 1994) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)); Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990) (recognizing both facial and as-applied Equal Protection violations for landowners). Here, nevertheless, the Complaint alleges that no economic value exists for Tract 184 because the cost burden placed solely upon Plaintiff for the road exceeds its lot's value after installation, while 9 other lot owners bear nothing. The Complaint does not allege a mere reduction in value or a partial taking but alleges the complete taking of all economic value. Paragraph 16 (e) of the Complaint alleges a deprivation of: ". . . any reasonable and/or substantial economic use and/or value of the property." That pleading is a part of all seven counts in the Complaint, including the Equal Protection claim.[3] However, even if Tract 184 did retain some usefulness and/or economic value, such usefulness and economic value would not preclude consideration under an Equal Protection analysis; e.g., whether F&G was being subjected to an unduly burdensome impact without rational basis for such impact. Thus, because the lower courts wrongly decided the Equal Protection claim; i.e., on grounds of viable usefulness and economic value; their decisions conflict with established federal law regarding how Equal Protection claims must be decided, and the Court should grant certiorari to correct this error.

II. PETITIONER'S FACIAL AND AS-APPLIED EQUAL PROTECTION CHALLENGES ARE RIPE FOR ADJUDICATION.

The only grounds that might be ascribed to the trial court's dismissal of the Equal Protection claims were that the property had "viable economic use and value" and that "real doubt is cast upon whether Plaintiff's asserted Claim is ripe for

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[3]The standard of review is *de novo* regarding a dismissal for failure to state a claim, applying the same standard used by the district court, accepting the allegations set forth in the complaint as true for purposes of a motion to dismiss. See Kissimmee River Valley Sportsmen Ass'n v. City of Lakeland, 250 F.3d 1324, 1325 (11th Cir. 2001).

determination as a result of any dispositive action by Defendant."[4] The Court erred as a matter of law in dismissing F&G's facial and as-applied Equal Protection challenges to Brevard County's ordinances and resolutions on the basis of a lack of ripeness because the rulings of the Florida courts apparently have decided an important issue of federal law that ought to be decided by this Court; or, have decided an issue of federal law conflicting with rulings of this Court and with a United States Court of Appeals.

A. Ripeness is irrelevant to a facial Equal Protection challenge.

The lower courts erred as a matter of law in dismissing F&G's facial Equal Protection challenge to Brevard County's ordinances and resolutions on the basis of a lack of ripeness where the Complaint alleged that Brevard County has made a final decision and the County's action was arbitrary, capricious, and a thinly disguised method to create an unfair, illegal, and confiscatory tax or condition upon Petitioner's property which results in a permanent inordinate burden thereon.[5] Regarding ripeness in the context of inverse condemnation cases that are highly analogous to the instant case, this Court stated:

> [F]acial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an "uphill battle," Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987), since it is difficult to demonstrate that "'mere enactment'" of a piece of legislation "deprived [the owner] of economically viable use of [his] property." Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 297 (1981).

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 736, n.10 (1997); see also Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that whether mere enactment of the statute amounted to a taking was a justiciable issue where the landowners who challenged zoning ordinances restricting the number of

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[4] See Footnote 1 regarding treating multiple reasons for dismissal as alternative bases of decision.

[5] See Footnote 3 regarding de novo standard of review.

houses they could build on their property sued without seeking approval for any particular development on their land). Thus, even if this Court chose to apply the ripeness analysis developed in the takings context to the Equal Protection context, the issue of ripeness is essentially inapplicable to a facial challenge.

However, it does not appear that this Court has expressly applied the same ripeness analysis used in takings cases to Equal Protection claims. For instance, this Court noted in Suitum that the lower court held that "[t]hese ripeness requirements, while developed in the regulatory taking context, 'are equally applicable to the due process and equal protection claims' 80 F.3d, [359,]362, n. 1. We address only the ripeness requirements for Suitum's takings claim, however, and express no opinion on the ripeness of her other claims." Id. at 733, n6. The Eleventh Circuit has held implicitly that a facial Equal Protection challenge has no ripeness requirement. See Southeast Florida Cable, Inc., v. Martin County, Florida, 173 F.3d 1332, 1338-39 (11th Cir. 1999) (holding that the terms of an FCC procedure do not require a final decision); Jackson v. Okaloosa County, Florida, 21 F.3d 1531, 1541 (11th Cir. 1994) (holding that ripeness is inapplicable because if the additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted).[6] Further-more, in stating its Equal Protection doctrine regarding land-use ordinances, the Eleventh Circuit extensively relied on Fry v. City of Hayward, 701 F. Supp. 179 (N.D. Cal. 1988). Eide, 908 F.2d at 716. The Fry Court held that a "final decision" on the application of a statute is not a prerequisite to a facial Equal Protection challenge. 701 F. Supp. at 181.

The Eide court also cited Pennell v. City of San Jose, 485 U.S. 1, 9-12 (1988), for the proposition that facial arbitrary and

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[6]The Jackson Court noted that in adjudicating Fair Housing Act claims, some courts have found it unnecessary for plaintiffs to exhaust local remedies, including zoning remedies, where an imminent injury exists. Id. at 1541, n16 (citing Huntington Branch, N.A.A.C.P. v. Town of Huntington, 689 F.2d 391, 393-94, n3 (2d Cir. 1982); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1214-16 (8th Cir.1972)).

capricious due process claims were considered on their merits while as-applied equal protection and due process claims were not ripe. 908 F.2d at 723. Here, the inapplicability of ripeness to facial challenges as cited above is consistently applicable to F&G's facial Equal Protection challenge because the Complaint alleged that Brevard County has made a final decision and the County's action was arbitrary, capricious, and a thinly disguised method to create an unfair, illegal, and confiscatory tax or condition upon Petitioner's property which results in a permanent inordinate burden thereon. The enactments, by themselves, mean that F&G's facial Equal Protection claim is sufficiently mature, and the issues are sufficiently defined and concrete, to permit effective decisionmaking by the court. Thus, F&G's facial challenge to Brevard County's resolution and ordinances should not have been dismissed on grounds of lack of ripeness. Therefore, this Court should grant certiorari to explicitly hold that facial Equal Protection challenges may not be dismissed for lack of ripeness.

B. F&G's as-applied Equal Protection claim was ripe for adjudication.

The trial court's order dismissing F&G's Equal Protection claim on grounds of ripeness conflicts with decisions of a federal Court of Appeals regarding ripeness. To establish ripeness of such an equal protection claim, the claimant must show only that the government has made a final decision adverse to the claimant's property rights. See Executive 100, Inc., v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991) (citing Eide, 908 F.2d at 724 ,n12,725 n16). Moreover, Equal Protection claims that are based on allegations that the government's action had no rational basis, are not barred by the reapplication requirement stated in Mac-Donald, Sommers, & Frates, 477 U.S. at 340, even if reapplication were possible or relevant. Executive 100, 922 F.2d at 1541.

The reasoning behind requiring a final agency decision is because without such a decision, it would be impossible to determine what the final impact of the specific regulation is on a specific piece of property, and the court could not determine whether economic viability had been substantially destroyed. See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 189 (1985). However, in this case, the damage to F&G's business has already occurred.

F&G has been unable to sell Tract 184 or any other of its lots in the area since Brevard County's regulatory actions culminated in the revoking of the MSBU Ordinance on October 18, 1994. The enactments of Brevard County's resolution and ordinances caused F&G sufficient injury to meet Article III's requirement of a case or controversy because F&G was forced to halt sale of Tract 184, as the land had lost all market value. That F&G has not applied for any permits is irrelevant to its Equal Protection claim. F&G's only business is selling real estate and Brevard County's actions have killed the market value of F&G's land because potential homebuilders will no longer buy land that would have a lower economic value after a road is constructed to make the land buildable than the cost of the road itself. F&G should not be required to change its business and become a developer or homebuildrer just to be able to challenge the Respondents' actions as a denial of Equal Protection. There is no additional action for F&G or Brevard County to take to prevent the Equal Protection violation because the business is already destroyed.

Nevertheless, the Complaint, at Paragraph 15, alleges that F&G did appeal to the County Commission to adopt a cost-sharing mechanism for the construction of unpaved roads, which the County declined to do. The October 17, 1995, refusal by the Brevard County Commission to amend the Unpaved Road Ordinance was the equivalent of a variance request and the final point of administrative exhaustion. As alleged in the Complaint, F&G had exhausted its administrative remedies and the matter was ripe for judicial review.

III. THE COUNTY'S ORDINANCES, FACIALLY AND AS APPLIED, DENY EQUAL PROTECTION BY ELIMINATING COST-SHARING MECHANISMS.

The 5th DCA P.C.A. of the dismissal of F&G's Equal Protection claim for failure to state a claim upon which relief could be granted, despite allegations of the unfairly cumulative burden caused by the enactment of new road requirements and the abolition of a viable mechanism for cost sharing and equitable contribution, was a state court of last resort deciding an important question of federal law that has not been, but should be, settled by this Court. Respondent Brevard County violated F&G's Equal Protection rights under the United States

Constitution because the County's actions in denying equitable contribution or similar cost-sharing mechanisms for ameliorating the disproportionately dire effects of the County's actions severely injured F&G and bears no rational relationship to legitimate governmental interests. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (internal quotations and citation omitted). A regulation is invalid and will not be sustained if the classification drawn by the regulation is not rationally related to a legitimate state interest. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). The Equal Protection clause does not deny to states the power to treat different classes of persons in different ways; it does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on basis of criteria wholly unrelated to the object of that statute. See Eisenstadt v. Baird, 405 U.S. 438 (1972); see also Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980) (holding that a state violates the Equal Protection clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently). Here, F&G is a member of the class of property owners who are required to build a road to their property before obtaining a building permit, and who must bear the entire cost of such road construction. The road may be paved or unpaved; however, under the unpaved road ordinance, no MSBU or other similar cost-sharing mechanism is available under any circumstances to obtain equitable contribution from the adjoining property owners that would directly benefit from the road. Under the paved road ordinance, an MSBU is available only to members of the class of property owners who live less than 1320 feet from a county-maintained, paved road where housing does exist on the road easement; however, because Lot 184 is on a road easement where housing does not exist, no MSBU or similar cost-sharing mechanism is available to obtain equitable contribution from the adjoining property owners that would directly benefit from the road. Thus, the class to which F&G belongs is inordinately

burdened by the road ordinances requiring the class to bear the costs of road construction without any equitable contribution from adjacent landowners who thereby enjoy windfall benefits from F&G's bearing of the entire cost of the road construction.

Allowing the windfall; i.e., creating a disproportionate burden; is not rationally related to any legitimate governmental interest; and, if considered as an exaction, is not roughly proportional to such interests. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (holding in takings context that exactions must bear rough proportionality to government's interest. One analogous and time-honored precept of law requires that "special assessments should in no case exceed the benefits they confer to the property improved and that if the governmental entity imposes an assessment in excess of benefits, it will be held to the extent of the excess as the taking of property without due process of law. Stockman v. City of Trenton, 181 So. 383, 384 (1936). Historically, the cost of roads are assessed proportionately. The water and sewer extension policy followed by utilities in Florida and throughout the nation for over 50 years requires proportionality of burden; i.e., pro rata charging for benefits of infrastructure improvements; even when the initial cost is borne by the first user. For instance:

> Users 'who benefit especially . . . by the extension of the system . . . should bear the cost of that extension.' On the other hand, it is not 'just and equitable' . . . to impose the entire burden of capital expenditures . . . on persons connecting to a water and sewer system after an arbitrarily chosen time certain.
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> New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant.

Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, Fla., 329 So. 2d 314, 320-21 (Fla. 1976) (emphasis added, footnote omitted, citing extensively Hartman v. Aurora Sanitary Dist., 177 N.E.2d 214 (Ill. 1961)); cert. den., 444 U.S. 867 (1979). Here, the rational and equitable spreading of the

burden is denied to F&G by the ordinances. In enacting a new requirement that F&G and similar landowners construct a costly road to obtain a building permit; while, at the same time, effectively abolishing a legal mechanism that would have allowed F&G and similar landowners to assess owners of land adjoining the new road a pro rata share of the cost of the construction of the new road when the new road would also enable owners of land ad-joining the new road to obtain building permits; and, in not providing any other effective way of spreading the cost to those greatly and directly benefitting from the new road requirement, Respondent Brevard County violated F&G's right to Equal Protection. F&G's recourse to the cost-sharing mechanism was a vested right; and, even if Respondent Brevard County at one time did not have to provide the mechanism, Brevard County could not abolish the mechanism it provided without responsibility for the consequences when such consequences are so egregious and bear so little rational relationship to the County's legitimate interests. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (holding that the city had the burden to ensure rough proportionality in specific applications of its land-use regulations). When the County eliminated the MSBU and did not replace it with any other mechanism with which to fairly distribute the burden; e.g., main-tain economic value for the lots subject to the new road ordinan-ces; F&G's Equal Protection rights were violated and the County then had a duty to provide relief; e.g., pay for economic damages. In sum, eliminating equitable contribution while the newly oner-ous road ordinances are in effect and without providing any other ameliorating mechanism is too highly attenuated for any rational relationship to exist with a legitimate public purpose. Thus, F&G's Equal Protection claim was viable, both facially and as applied. Therefore, certiorari should be granted to determine whether dismissal of F&G's facial and as-applied Equal Protection claims should be reversed and remanded for trial on their merits.

IV. PRECLUSION OF PRIVATE DEFENDANTS AND JURY TRIAL, AND REQUIREMENT OF "MITIGATION MARKET" PARTICIPATION, ARE AN INADEQUATE POST-DEPRIVATION REMEDY.

The trial court's ruling, upheld by the Florida court of last resort, decided important federal questions that should be decided by this Court because the trial court entered summary judgment in favor of Respondents on the federal Fifth and Fourtheenth Amendment takings claims, while allowing the state law inverse condemnation claim to proceed. "Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court, unless the State does not provide adequate remedies for obtaining compensation." Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997). Here, in the three subsections below, F&G discusses how F&G should have been allowed to try its federal takings claims without first undergoing the state law inverse condemnation procedure because Florida state court procedure for claiming inverse condemnation is an inadequate remedy: first, state law precludes F&G and others similarly situated from suing private entity state actors; i.e., Respondents Kevin Judd and The Nature Conservancy; for their role as state actors in effecting a taking of F&G's land; second, state law precludes F&G and others similarly situated from obtaining a trial by jury regarding whether the taking occurred; and, third, state law requires F&G to participate in a mitigation market to sell its property for less than fair market value in a market artificially created by Respondents in an effort to avoid paying fair market value.

A. The Florida inverse condemnation remedy is inadequate because F&G's state claim for inverse condemnation cannot be brought against a private entity acting in the role of state actor.

Under Florida inverse condemnation law, F&G's claim can be made only against specified public entities. See Florida Statute 74.011 (specifying those public entities that may exercise eminent domain). However, § 1983 provides that a private entity (here TNC and Judd), can be sued for taking without just compensation if the private entity is a state actor. In this case, The Nature Conservancy and Mr. Judd were under contract with Respondent Brevard County to acquire F&G's land for a legitimate -- even laudable -- public purpose; i.e., government preservation as a wildlife refuge. It is the ways and means by which all Respondents acted -- all acting under color of state law

-- in acquiring the land that resulted in the deprivation of F&G's Fifth Amendment rights. Thus, the Florida state procedures offer no remedy to F&G against TNC and Judd for the taking.

The exemption of private-entity state actors is especially important because TNC and Judd can be liable for exemplary and punitive damages as private parties, while the County cannot be required to pay such damages. Thus, the Florida state procedures are inadequate in this case because F&G is precluded from suing two defendants and is precluded from an entire category of potential damages.

This issue raises an important federal question in this era of privatization of traditional government functions. See Richardson v. McKnight, 521 U.S. 399 (1997) (discussing heightened need and ability to hold private-entity government contractors accountable for § 1983 violations). Here, a strong likelihood exists that The Nature Conservancy and Mr. Judd would have been found liable for a Fifth Amendment taking. Thus, because Florida law offers no remedy for The Nature Conservancy and Judd's taking of F&G's property, Florida's state remedies were inadequate, and this Court should grant certiorari to declare the remedy inadequate.

B. The Florida inverse condemnation remedy is inadequate because F&G's state claim for inverse condemnation cannot be tried before a jury.

The trial court's ruling, upheld by the State court of last resort, decided an important federal question that should be decided by this Court; i.e., F&G's Fifth Amendment takings claim should not have been dismissed because the State of Florida's preclusion of a trial by jury for an inverse condemnation claim is an inadequate remedy under law; and, therefore, F&G was not required to exhaust its state court remedy to bring its Fifth Amendment takings claim. In a state law claim in Florida for inverse condemnation, the question of whether a taking has occurred is decided by the court, not by the jury. See Department of Agriculture & Consumer Svcs. v. Bonanno, 568 So. 2d 24, 28 (Fla. 1990). However, in federal court, claims of violations of Fifth Amendment taking and other rights secured under 42 U.S.C. § 1983 are entitled to the Seventh Amendment guarantee of trial by jury. See City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 708-11 (1999) (recognizing

that just compensation "is a purpose traditionally associated with legal relief"). Here, some or all of the disputed questions in the instant case were whether Respondents had denied a Fifth Amendment right in acting outside the bounds of their legitimate authority, a classic question for the jury. The right to a jury trial is a substantial right of citizens on so fundamental an issue as the deprivation of property, allowing a deprivation by the state without a jury trial undermines the adequacy of the state law takings remedy, and this Court should grant certiorari to declare the state remedy inadequate.

C. Florida's remedy is inadequate in forcing mitigation sales.

In essence, Respondents declared that "mitigation sales" were F&G's remedy for Respondents' actions that affected the value of F&G's property. Subsequently, pursuant to F&G litigating its inverse condemnation claim under Florida law, the trial court found and the 5th DCA affirmed that F&G's economically viable use of the property was not denied because "mitigation sales" of the land are possible. The affirmance of the mitigation market as a remedy for a taking by a Florida court of last resort means that this Court should decide whether such a remedy is inadequate for a taking, thereby allowing F&G to have brought a federal takings claim without exhausting the State of Florida court procedure.

The "mitigation market" purportedly is an exchange created by Brevard County that allows developers to purchase land in the Scrub Jay Refugia which will not be developed as a credit to offset or mitigate (and, ultimately, to facilitate) development of other environmentally sensitive areas in Brevard County. The market supply and demand (and, ergo, the price and economic value of land in the mitigation market) is controlled by Brevard County because the County specifies which land is eligible for mitigation sales and which land may be developed. This "remedy" of forcing F&G into the mitigation market raises an important question of federal law not previously addressed by this Court, although this Court has dealt to a limited extent with the somewhat analogous issue of Transferable Development Rights (TDR's) in Suitum, 520 U.S. at 725, and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

Here, F&G averaged sales of 60 lots per year before the alleged taking occurred; and, immediately prior to the time of taking, F&G's lots had an average economic value in excess of $11,500 per lot; after the taking occurred, F&G could not sell any Core lots except a very few as mitigation sales for about $6,000.00 per lot. (TT 718:25-720:14.) Expert testimony was that, other than theoretically for mitigation sales, the lots in the core areas could not be sold, and the open market was dead; i.e., the lots had no economic value on the open market. (TT 701:5-14.) In fact, F&G's expert testified that F&G's situation was emblematic of a national concern for the "extinct market" phenomenon. (TT 703:21-705:23.)

F&G also adduced evidence that questioned whether the mitigation market actually exists or whether just a few mitigation sales were made as anomalous events. Nevertheless, if any mitigation market did exist, it would be artificially created by the same regulatory body (Brevard County) and driven by the same project (scrub jay preservation) that is seeking to conserve that property. In other words, even if this artificial market actually exists, the County created and controls the market through its scrub jay regulations and development permits. Respondents should not be allowed to use regulatory powers under color of state law to decrease the market value of the property so that Respondents can purchase the property for a lower amount and evade responsibility for a taking. See Joint Ventures, Inc., v. Department of Trans., 563 So. 2d 622, 625-26 (Fla. 1990) (citing cases from many other states to support the proposition that no valid distinction can be made between "freezing" property and deliberately attempting to depress land values in anticipation of eminent domain proceedings). Moreover, expert testimony stated that according to the Appraisal Institute, such mitigation sales are between hostage buyers and sellers and cannot be considered by land appraisers in establishing economic use. (TT 712:17-713:14.) The purported mitigation market is a way the County used its police powers to obtain the property at less than fair market value. Regarding a less controlled exchange program in a takings context, Justice Scalia (joined by Justice O'Connor) discussed at length the problems that arise with TDRs; e.g., whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than

on the question of whether the compensation for the taking is adequate, allowing the government to get away with paying much less. Suitum, 520 U.S. at 747-49 (Scalia, J., concurring). Here, Brevard County and the Florida courts "remedy" is to effectively channel F&G's land as inventory for the price-depressed mitigation market. Such a remedy is inadequate under the Fifth Amendment as a systematic way of evading payment of full and just compensation. This Court should grant certiorari to resolve this important question of takings law.

V. F&G ADDUCED SUFFICIENT EVIDENCE OF A § 1983 CONSPIRACY CLAIM TO SURVIVE SUMMARY JUDGMENT.

The affirmance of summary judgment against Petitioner F&G on F&G's § 1983 conspiracy count was a decision by a state court of last resort deciding an issue of federal law in conflict with decisions of this Court because F&G adduced substantial evidence that Respondents acted together under color of state law and pursuant to agreements between and among the Respondents to deny F&G rights protected by the United States Constitution and by federal law; e.g., the right to Equal Protection and the right to just compensation for the taking of property for public use. As a threshold matter, "the moving party [has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (citations omitted) (holding that the conspiracy claim should be tried because the defendant did not carry its burden because of its failure to foreclose the possibility that there was contact and an agreement between the government employee and the private entity). In deciding a Rule 56 motion for summary judgment, the movant must "show conclusively that a fact alleged by [the nonmovant] was not susceptible of an interpretation that might give rise to an inference of conspiracy." Id. at 160. Title 42 U.S.C. § 1983 provides a civil cause of action for violation of one's federally protected rights by a person acting under color of state law (a state actor). To prove a cause of action under § 1983, a plaintiff must show two elements: 1) a violation of the plaintiff's federally protected rights occurred, and 2) the violation was committed under color of state law. Willis v. University

Health Services, Inc., 993 F.2d 837, 840 (11th Cir. 1993). The Eleventh Circuit's predecessor stated:

> Of course, for a claim under § 1983, a conspiracy as such is not an indispensable element as it is under § 1985. But it may be charged as the legal mechanism through which to impose liability on each and all of the Defendants without regard to the person doing the particular act. [Footnote of citations omitted.] Conspiracy is asserted in that situation on more or less traditional principles of agency, partnership, joint venture, and the like.

Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963), cert. denied, 375 U.S. 975 (remanding the 'conspiracy' aspect of the plaintiffs claims as to other actions violating Civil Rights for jury submission "unless the facts compel a direction one way or the other"). Here, as discussed in the subsections below, F&G adduced substantial evidence of material fact as to each of these elements.

A. Respondents Brevard County, TNC, and Judd were acting under color of state law.

Under the standard for summary judgment, F&G adduced sufficient evidence to maintain its claim of conspiracy under 42 U.S.C. § 1983 against Respondents Brevard County, TNC, and Judd. As this Court stated:

> [T]o act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions.

Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (citing Adickes, 398 U.S. at 152; and United States v. Price, 383 U.S. 787, 794 (1966)); accord Tower v. Glover, 467 U.S. 914, 919-20 (1984). This Court also stated:

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; Monroe v. Pape, 365 U.S. 167 (1961); see United States v. Classic, 313

U.S. 299, 326 (1941); Screws v. United States, 325 U.S. 91, 107--111 (1945); Williams v. United States, 341 U.S. 97, 99--100 (1951).

Adickes, 398 U.S. at 152 (footnote omitted); Briscoe v. Lahue, 460 U.S. 325, 329-30 (1983) (noting that it is necessary to go beyond the "color of law" analysis to consider whether private witnesses may ever be held liable for damages under § 1983). Furthermore, a private entity is considered to be acting under color of state law if it meets any one of three criteria: 1) the private actor is performing a function that is traditionally a public function; 2) the actor is acting under state compulsion; or 3) the actor and the state have a nexus, or are acting jointly. National Broadcasting Co., Inc. v. Communications Workers of America, AFL-CIO, 860 F.2d 1022, 1026 (11th Cir. 1988); see also Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992). "[P]rivate actors [have] aligned themselves so closely with either state action or state actors that the undertow pulls them inexorably into the grasp' of § 1983." Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 253-54 (1st Cir. 1996). Also, the Eleventh Circuit stated that the trial court "wrongfully required a plaintiff to produce a 'smoking gun' when nothing more than an 'understanding' and 'willful participation' between private and state defendants is necessary to show the kind of joint action that will subject private parties to s 1983 liability." Bendiburg v. Dempsey, 909 F.2d 463, 469 (11th Cir. 1990).

In this case, TNC and Judd are state actors because they were executing a contractual agreement to acquire the real property of F&G and nearby landowners for wildlife preservation. "[S]tate employment is generally sufficient to render the defendant a state actor." West v. Atkins, 487 U.S. 42, 49 (1988) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936, n.6 (1982)). Thus, by the terms of their own contract, TNC and Judd worked under color of state law with the County to acquire property for the County for conservation purposes.

Moreover, TNC and Judd's role as acquisition agents for the County is a function traditionally reserved exclusively for the state. "The public function analysis is designed to flush out a State's attempt to evade its responsibilities by delegating them to private entities." Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18-19 (1st Cir. 1999). If the Court accepts TNC and

Judd's arguments with respect to whether they were state actors, then the County will be able "to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citing Evans v. Newton, 382 U.S. 296, (1966) (private trustees appointed to manage previously public park for white persons only))."To date, the short list of activities that have been held to satisfy this demanding criterion includes 'the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park.'" Perkins, 1999 WL 997787 at *4 (quoting United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 907 (4th Cir. 1995)) (citations omitted). The case law holds that eminent domain is a type of action reserved exclusively to the states, id.; see also Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758, 763 (6th Cir. 1999), and the acquisition of scrub jay habitat is a function of park management. Thus, because F&G showed a material issue of fact as to whether or not TNC and Judd cooperated with the County in taking F&G's property (in the form of inverse condemnation, a type of eminent domain and park management), this conduct on the part of TNC and Judd is in furtherance of exclusively state functions, and TNC and Judd are state actors for purposes of § 1983.

B. Many issues of material fact exist to evince a conspiracy among and between Respondents.

F&G adduced substantial evidence of all of the necessary elements of its claims that Respondents violated F&G's right to just compensation for a taking and right to Equal Protection. A conspiracy under 42 U.S.C. § 1983 is an agreement between two or more individuals, where one individual acts in furtherance of the objective of the conspiracy, which causes an injury to a person or property, or deprives a person of exercising any right or privilege as a United States citizen. See Scott v. Dixon, 720 F.2d 1542, 1545 (11th Cir. 1983), cert. denied, 469 U.S. 832, 105 S.Ct. 122, 83 L.Ed.2d 64 (1984). Here, as a matter of law, sufficient evidence of F&G's takings claim is established by the fact that F&G's state law inverse condemnation claim survived summary judgment and went to a bench trial, even though the

state law claim does not provide a jury trial or other remedies as argued elsewhere in this Petition. Also, as argued elsewhere in this Petition, F&G alleged sufficient facts to state an Equal Protection claim against Brevard County to which the § 1983 Conspiracy claim against all Respondents attaches.

The evidence of Respondents' conspiracy shows: first, a conspiracy between the parties TNC, Judd, and Brevard County; a conspiracy to do an unlawful act or to do a lawful act by unlawful means, including to take property without just compensation, to deny state and federal due process, and to disregard statutory requirements for appraisals and land acquisition methods; the doing of the overt acts of entry into the Brevard County/TNC contract, implementation of the Scrub Jay Plan, erection of physical barriers, deliberate destruction of the residential market through clear-cutting and "controlled" burns, and attempts to coerce transfer of land ownership for substantially less than fair market value -- all in pursuance of the conspiracy; and fourth, damage to F&G, including loss of land's economic value, physical deprivation of the land, business damages, and attorney fees -- all as a result of Respondents' acts done under the conspiracy.

Specifically, F&G adduced substantial evidence that Defendants reached an understanding' to violate F&G's rights. Even if a § 1983 conspiracy claimant has no direct knowledge of an agreement between alleged co-conspirators, the sequence of events created a substantial enough possibility of a conspiracy to allow the conspiracy claim to proceed to trial, especially if the noncircumstantial evidence of the conspiracy could only come from adverse witnesses. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Also, circumstantial evidence can raise an issue of motive regarding a conspiracy to deprive the claimant of federally protected rights. Id. Here, again, a contract was created between Brevard County and TNC that is an express written agreement of the understanding to implement the de facto restrictions of the Scrub Jay Plan; to use controlled burns, publicity, and other means to devalue the land and implement the Plan; to use illegal methods to assess the value of affected lands; and, to pay F&G and other similarly situated landowners less than fair market value for the lands that are thereby acquired; i.e., taken. Also, TNC was aware of the below market value policy of

the County (Pfeffer Deposition, Proffer of Evidence) and responded as early as their job-seeking Proposal of July 9, 1993 (Exhibit I to Complaint). It states in paragraph 3, Statement of Qualifications that TNC "negotiated... contracts ... 79.5% of the fair market value," that it was "experience in contracting for appropriate boundary mapping, surveys, environmental audits and appraisals" and that it "can assess the methodology employed by these professionals and its compliance with the standards required. . ." Furthermore, TNC and the County's actions in concert with each other to perform the contract and implement the Plan is also evidence of their understanding.

Regarding Judd, the evidence shows that Judd and his co-defendants reached an understanding to violate F&G's rights through the training of Judd to perform the Brevard County/TNC contract and his voluntary undertaking to do so. Specifically, Judd set the land prices and negotiated the acquisitions with landowners, telling them it was a "one-time only offer" and that funds were "limited." Then, Judd boasted of his success in acquiring the taken land for substantially less than fair market value.

Additionally, evidence is adduced to show that all Respondents possessed one or more peculiar power of coercion by virtue of their combination, which power an individual Respondent could not possess. Respondent Brevard County lacked the staff and expertise to implement the Plan and acquire the land; TNC could not implement the Plan or acquire the land without County contractual approval; and, both Brevard County and TNC needed an actual person; i.e., Judd; to perform the acquisition actions that Judd could not have performed without the County contract and TNC employment. Therefore, because the Florida court of last resort affirmed the summary judgment against F&G's § 1983 conspiracy claims in conflict with decisions of this Court, this Court should grant certiorari to consider remanding these claims for jury trial.

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